In the Supreme Court

of the United States

October Term, 1958.

No. [redacted] 43

WILLIAM R. FORMAN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FOR THE NINTH CIRCUIT

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CASES CITED

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To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States.

Your Petitioner WILLIAM R. FORMAN respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Court to review the portion of the Order and Judgment of the United States Court of Appeals for the Ninth Cir-

cuit entered in this case October 27, 1958, insofar as it modifies the Opinion and Judgment of said Court entered in this case on September 15, 1958, by directing a new trial instead of the original direction for entry of judgment of acquittal, and the Order and Judgment of said Court entered in this case on February 26, 1959, denying (Appellant's) Petitioner's Petition for Re-hearing.

OPINIONS BELOW.

There was no Opinion in the United States District Court.

On September 15, 1958, the United States Court of Appeals rendered its Opinion in which it reversed the Judgment of Conviction and remanded the cause "with directions to enter judgment for the Appellant" (Petitioner). The Opinion is reported in **259 F. 2d 128,** and a copy thereof is printed in the Appendix hereto (App. p. 47).

On October 27, 1958, the United States Court of Appeals for the Ninth Circuit rendered its Opinion on Appellee's Petition for Modification of the Opinion in which the Court granted the petition and directed that the former Opinion be modified so as to provide that the Judgment is reversed and the cause remanded for a new trial instead of directing the entry of judgment of acquittal as it did in the judgment of September 15, 1958. This Opinion is reported in **261 F. 2d 181.**

A copy of this Opinion is printed in the Appendix hereto (App. p. 65).

On February 26, 1959, the United States Court of Appeals for the Ninth Circuit rendered its opinion upon Appellant's Petition for Re-hearing, denying said petition. This Opinion has not yet been published in the Federal Reporter System. A copy of this Opinion is printed in the Appendix to this petition (App. p. 68).

STATEMENT OF JURISDICTION.

The Order and Judgment of the United States Court of Appeals for the Ninth Circuit, sought to be reviewed, were both dated and entered on October 27, 1958 (Tr. of R. 1935-6-7).

Within the time allowed by the Rules of the United States Court of Appeals for the Ninth Circuit, to-wit, within thirty days from the entry of said Judgment, Petitioner, Appellant in said cause, filed a petition for re-hearing. The Order denying the petition for re-hearing was entered on February 26, 1959 (Tr. of R. 1941).

On March 4, 1959, an Order was entered in said Court staying issuance of the Mandate until March 27, 1959, provided petition for writ of certiorari is filed in the Supreme Court on or before that date and, if filed, until final disposition in the Supreme Court.

The Jurisdiction of this Court is invoked under 28 U. S. C. A., Section 1254(1).

QUESTIONS PRESENTED FOR REVIEW.

1. Where the United States District Court submitted the case to the Jury on preemptory instruction that prosecution for the primary conspiracy to attempt to evade the tax was barred by the statute of limitations unless the Jury found that a subsidiary conspiracy was entered into (of the character described in **Krulewitch v. U. S., 336 U.S. 440,** and **Grunewald v. U. S., 353 U.S. 391**), which would prolong the life of the primary conspiracy, and the United States Court of Appeals determined that such a subsidiary conspiracy was not established and by reason thereof, it was

"error to permit the case to go to the Jury,"

and directed the entry of a judgment of acquittal, can the United States Court of Appeals thereafter direct a new trial because

"the case might have been tried"

on an "alternative theory"?

2. Does the judgment and order directing a new trial instead of a judgment of acquittal constitute a violation of the 5th Amendment to the Constitution of the United States which provides:

> ". . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . ."

under the conditions prevailing in this case?

3. Does the judgment ordering a new trial, instead of directing the entry of a judgment of

acquittal, constitute an "appropriate judgment" and "just under the circumstances?" **(28 U. S. C. A., Section 2106).**

4. Is the direction for a new trial justified where the Petitioner was entitled, as a matter of law, to the entry of a judgment of acquittal in the United States District Court at the close of the entire case on the ground that the prosecution was barred by the statute of limitations and the United States Court of Appeals so determined?

5. Can the United States Court of Appeals for the Ninth Circuit, after reversing the conviction because "it was error to permit this case to go to the jury", remand the case for a new trial because "the case might have been tried" on an "alternative theory" different from the theory upon which the case was tried and submitted to the jury where the Government:

(a) did not in the Trial Court object or take exception to the instructions embodying the theory on which the case was submitted;

(b) did not request that the case be submitted upon any other theory;

(c) did not in its brief in the United States Court of Appeals assign, as error or contend, that the case was submitted on an erroneous theory;

(d) did not in oral argument make such contention and

(e) raised the question, for the first time, by petition to modify the decision, after the United States Court of Appeals rendered its decision reversing the conviction with directions for the entry of a judgment of acquittal.

6. Can the Appellee (the Government) in a criminal case who has not cross-appealed and cannot, as a matter of law cross-appeal, assert error, if any there be, with respect to the instructions of the Court and seek a new trial by reason thereof?

7. Has the Court below, by the judgment sought to be reviewed, so far departed from the accepted and usual course of judicial proceedings resulting in denial to the petitioner of the protection of the constitutional guarantee against double jeopardy for the same offense as to call for the exercise of this Court's power of supervision?

8. Did the District Court of the United States for the Western District of Washington, Southern Division, have jurisdiction of an indictment returned by a Grand Jury which:

(a) was directed to be composed of residents of the **Southern** Division only?

(b) was **empaneled to consider only offenses committed in the Southern Division,** where the indictment on its face discloses that the conspiracy itself was formed in the Northern Division and the only overt acts alleged to have been committed within the period of the statute of limitations are alleged to have been committed in the Northern Division and the only overt acts alleged to have been committed in the Southern Division were prior to the applicable period of the statute of limitations?

9. Did the District Court of the United States for the Western District of Washington, Southern Division, have jurisdiction of an indictment re-

turned by a Grand Jury composed, as above described, charging a conspiracy described in paragraph D of the indictment (Tr. of R. p. 5) where the only overt acts relevant thereto are alleged to have been committed in the Northern Division?

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES OF COURT INVOLVED

The following constitutional statutory provisions and rules of Courts are involved and are quoted herein in full.

The **5th Amendment to the Constitution of the United States** provides:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; **nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb**; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Title 28 U.S.C.A., Section 2106 provides:

> "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause

and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

Rule 30 of the Federal Rules of Criminal Procedure, so far as here material, provides:

"No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

REASONS FOR THE ALLOWANCE OF THE WRIT

There are special and important reasons for granting a writ of certiorari in this case as follows:

(1) Each of the questions presented herein embodies important questions of Federal Law which have not been, but which should be, settled by this Court.

(2) The decision herein, directing a new trial because "the case might have been tried upon" an "alternative theory" after judgment reversing Petitioner's conviction and directing the entry of a judgment of acquittal, violates Petitioner's rights under the 5th Amendment to the United States Constitution in that it places him twice in jeopardy for the same offense.

(3) The decision, sought to be reviewed, is in conflict with the decision of the Ninth Circuit in

Karn v. United States, 158 F. 2d 568, holding that the only proper disposition of an appeal under similar circumstances is to direct the Trial Court to enter a judgment of acquittal.

(4) The decision, sought to be reviewed, is in conflict with the decision of this Court in **Sapir v. United States, 348 U.S. 373—75 S. Ct. 422,** in which this Court summarily reversed the decision of the United States Court of Appeals for the Tenth Circuit which, first reversed the judgment with instructions to dismiss the indictment because the evidence was insufficient to convict, but later, **on motion of the Government, modified the judgment so as to grant a new trial.**

The decision is also in conflict with the principles recognized and applied by this Court in **Green v. United States, 355 U.S. 184.**

(5) The decision, sought to be reviewed, unsettles the law which this Court settled in the **Krulewitch, Lutwak** and **Grunewald cases** on the question of the statute of limitations applicable to conspiracy cases. If the decision, sought to be reviewed, is allowed to stand, it

> "would for all practical purposes wipe out the statute of limitations in conspiracy cases"

and

> "extend indefinitely the time within which hearsay declarations will bind conspirators."

(6) The case involves the important **question of jurisdiction of the Court in conspiracy cases** where

the conspiracy itself is formed and all of the overt acts committed within the statutory period of limitation are committed **without** the jurisdiction of the Court and the only overt act alleged as committed within the jurisdiction is barred by the statute of limitations.

(7) To permit the Government in criminal cases to claim error in the instructions to the jury and seek a new trial by reason thereof, after the United States Court of Appeals reverses a conviction and directs the entry of judgment of acquittal, violates the law which denies to the Government the right to move for a new trial or to appeal from a judgment in a criminal case, whether the judgment of the Court below is right or wrong, or whether it is for conviction or acquittal. The Government's petition for modification of the judgment to direct a new trial, was, in legal contemplation, the equivalent of a motion by the Government for a new trial in the United States District Court and or an appeal by the Government after judgment of acquittal. **(Opinion of Justice Douglas in Sapir v. U. S., 348 U.S. 373).**

(8) The Court below has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

STATEMENT OF THE CASE

Petitioner and one Seijas were indicted in one Count (XV) with conspiracy to attempt to evade Seijas' tax liability. (Not Petitioner's tax liability.)

There were fourteen other counts charging Seijas only with the substantive offense of attempted tax evasion. These Counts are not involved. The conspiracy Count was divided into four paragraphs, A, B, C and D, charging conspiracy to violate various statutes. Paragraphs A and B were withdrawn from consideration of the Jury and are not here involved.

In paragraphs C and D it was charged that Petitioner and Seijas conspired (Tr. of Rec. 5):

> "C. To violate Section 145(b) of the Internal Revenue Code, 26 U. S. C., Section 145(b), by knowingly and willfully attempting to defraud and evade a large portion of the income taxes owed by Armador A. Seijas and his wife, Betty L. Seijas, and others to the United States for the years 1942 to 1945, inclusive, upon their share of the unreported income of the afore-mentioned partnerships.
>
> "D. To violate Section 1001 of the New Criminal Code, 18 U.S.C., Section 1001, and Section 145(b) of the Internal Revenue Code, 26 U.S.C., Section 145(b), by furnishing officers and employees of the Treasury Department false books and records, and false financial statements, and by making false statements to such officers and employees for the purpose of concealing from the Treasury Department their share of the unreported income of the aforesaid partnerships, and for the pur-

pose of concealing from the Treasury Department the true income tax liability of Armador A. Seijas and his wife, Betty L. Seijas, for the years 1942 to 1945, inclusive.";

Petitioner alone was tried on this Count, Seijas having pleaded guilty. Upon the trial, at the close of the Government's case, Petitioner moved for a judgment of acquittal on the ground that the prosecution was barred by the statute of limitations. The motion was denied. At the close of the entire case, Petitioner renewed the motion for judgment of acquittal on the ground, among others, that prosecution was barred by the statute of limitations. The motion was denied and exception allowed (Tr. of Rec. 1762).

In submitting the case to the Jury, the Court instructed the Jury:

> "The conspiracy to evade the tax liability of defendant Seijas and his wife, if any there be, was consummated upon the filing of the individual tax returns of Seijas and his wife for the year 1945 which was filed in March, 1946, and the statute of limitations would run from that time, and if you so find, your verdict would have to be not guilty.
>
> "If you find that there was no subsidiary conspiracy to conceal as I have just outlined it to you, but acts of concealment were thereafter committed as an after-thought and were conceived after the filing of the returns in March, 1946, then, of course, your verdict must be for the defendant Forman." (Tr. 1808).

After the return of the verdict of guilty and within the time provided for in **Rule 29(b) of the**

Federal Rules of Criminal Procedure, Petitioner renewed the motion for the entry of a judgment of acquittal on the ground, among others, that the prosecution was barred by the statute of limitations (Tr. 101). He did not seek a new trial in the alternative on that ground.

Petitioner also filed a motion for a new trial to be considered in the event that the motion for judgment of acquittal was denied (Tr. 101).

On appeal to the United States Court of Appeals for the Ninth Circuit, Petitioner assigned as error the denial of his motions for a judgment of acquittal on the ground that prosecution was barred by the statute of limitations.

On September 15, 1958, that Court made and entered its Opinion and Judgment, reversing the judgment of conviction "with directions to enter judgment for the Appellant" (Opinion, Appendix, pp. 47 to 64), on the ground "that it was error to permit this case to go to the Jury."

This conclusion was arrived at because the alleged primary conspiracy was barred by the statute of limitations and the evidence, under the **Krulewitch** and **Grunewald cases** was insufficient to establish by "direct evidence"

> "an express original agreement among the conspirators to continue to act in concert in order to cover up, for their own self-protection, traces of the crime after its commission."

The reversal was not predicated on any erroneous instruction, or other "error infecting the trial," but upon the basic ground that the evidence failed to establish a subsidiary conspiracy of the character contemplated by the **Grunewald case** which would prolong or continue the alleged conspiracy.

Thereafter, the Government filed a motion for a modification of the judgment of the United States Court of Appeals by providing for the direction of a new trial instead of direction of the entry of a judgment of acquittal.

On October 27, 1958, the Court entered a Per Curiam Opinion granting the Government's motion.

The Government's motion and the decision rendered thereon (Opinion, Appendix, p. 65) was predicated on the proposition that the indictment presented "an alternative theory" upon which the case might have been tried" parallel to the alternative theory discussed in the **Grunewald case.**

This contention was not advanced in the District Court. The Government did not interpose any objection or take exception to the instruction as given on the theory on which the case was submitted. It did not request any instruction embodying the alleged "alternative theory." It did not, upon consideration of the motion for renewal of the motion for judgment of acquittal, advance this theory. It did not, in its brief in the United States Court of Appeals, advance this contention. It did not, in the brief, assert that the District Court erred in its

instructions in any respect and it did not advance that contention in the oral argument before the United States Court of Appeals notwithstanding the fact that the Supreme Court had already decided the **Grunewald case** and it was discussed in the Government's brief.

The contention was advanced, for the first time, in the Government's petition for modification of the judgment, after the United States Court of Appeals entered the judgment directing the entry of a judgment of acquittal.

ARGUMENT

Preliminary Statement

The pertinent facts relevant to the questions presented are as follows:

(a) It is the Government (Appellee) and not the defendant who petitioned the Court of Appeals for a new trial after it reversed with directions to enter judgment of acquittal.

(b) The decision of October 27, 1958, modifying the former judgment by directing a new trial instead of the entry of judgment of acquittal, was based on the ground that the case **"might have been tried"** upon an "alternative theory." (Appendix, p. 65).

(c) The Government did not, in the United States District Court, object to the instructions

submitting the case on the theory on which it was decided, nor except thereto, and did not submit any instructions requesting submission of the case on "another theory." **(Rule 30, Federal Rules of Criminal Procedure.)**

(d) The Government did not, on defendant's appeal, contend in its brief or in oral argument in the Court of Appeals, that the case "might" have been submitted on "another theory" or that the case was submitted on erroneous instructions.

(e) The Government presented the contention that the case might have been submitted on another theory, for the first time, in its petition for modification of the judgment of the Court of Appeals.

(f) The original judgment of September 15, 1958, reversing the conviction with directions to enter judgment of acquittal, was reversed solely on the ground that the Government failed to establish the subsidiary conspiracy of the character described in the **Krulewitch and Grunewald cases** which would prolong the operation of the statute of limitations and by reason thereof, "it was error to permit this case to go to the jury." (Appendix, pp. 63-64).

(g) The case was not reversed for any error in the instructions or in the admission or rejection of evidence "infecting" the trial.

(h) The petitioner did not seek a new trial in connection with its contention that the evidence

was insufficient to be submitted to the jury. He sought only judgment of acquittal on that ground. Petitioner sought a new trial only in the event that the Court of Appeals did not sustain the contention that the evidence was insufficient to go to the jury and then only on grounds of error affecting the trial.

I.

The Modification Directing a New Trial Instead of Direction for the Entry of a Judgment of Acquittal, Violates the Constitutional Prohibition Against Double Jeopardy Under the Circumstances of This Case.

In **Sapir v. United States, 348 U.S. 373,** the Court of Appeals reversed the conviction with directions to dismiss the indictment **(216 F. 2d 722).** The Government then petitioned to modify the judgment by directing a new trial instead of a dismissal of the indictment. The Court of Appeals granted the Government's petition **and this Court granted certiorari.**

This Court, in a Per Curiam Opinion, held:

> " 'The petition for writ of certiorari is granted.
>
> 'We believe that the judgment of the Court of Appeals of October 20, 1954, 216 F. 2d 722, reversing and **remanding** this cause **with instructions to dimiss** the indictment **was correct.** It is not necessary for us to pass on the question presented under its subsequent judgment of November 17, 1954, directing a new trial. We vacate the latter judgment, which directed

the new trial, and we reinstate the former one which instructed the trial court to dismiss the indictment.'

Mr. Justice Douglas wrote a concurring Opinion in which he said:

'The granting of a new trial after a judgment of acquittal **for lack of evidence** violates the command of the Fifth Amendment that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb."

'The correct rule was stated in Kepner v. United States, 195 U.S. 100, at page 130, 24 S. Ct. 797, at page 805, 49 L. Ed. 114, "It is, then, the settled law of this court that former jeopardy includes one who has been **acquitted by a verdict duly rendered** * * *." **If the jury had acquitted,** there **plainly would be double jeopardy to give the Government another go at this citizen.** If, as in the Kepner case, the trial **judge had rendered a verdict of acquittal,** the guarantee against **double jeopardy would prevent a new trial** of the old offense. **I see no difference when the appellate court orders a judgment of acquittal for lack of evidence.**

. . . . .

'But an acquittal on the basis of lack of evidence concludes the controversy, as the Kepner case holds, and puts it at rest under the protection of the Double Jeopardy Clause, absent a motion by the defendant for a new trial.' (Emphasis suppled).

Justice Douglas also said:

'If petitioner had asked for a new trial, different considerations would come into play, for then the defendant opens

> the whole record for such disposition as might be just.'

But he pointed out the **distinction** between reversal

> 'on grounds of error that infected the trial'

and cases based on

> 'lack of evidence.'

In the case at bar, defendant did not seek a new trial in connection with the renewal of the motion for judgment of acquittal. He only sought a new trial in connection with the assertion of errors, 'on grounds that infected the trial.' " (Emphasis supplied).

In Petitioner's (Appellant's) Brief, the CONCLUSION was as follows:

> "The judgment should be reversed with directions to enter a judgment of acquittal, if reversal is based on **any one** of the Specifications of Error numbered I, II, III, IV, V and VII." (Errors which entitled Appellant to a judgment of acquittal as a matter of law.)
>
> "If reversal is based on Specifications of Error numbered VI, VIII, IX and X, a new trial should be ordered." (Errors affecting the trial which would only authorize a new trial.) (Matter in parentheses added.)

The case of **Bryan v. United States, 338 U.S. 552,** is not dispositive here because in that case the Appellant, although urging lack of evidence which would have entitled him to a judgment of acquittal, asked alternative relief of either judgment of acquittal or a new trial.

In the case at bar, Petitioner did not ask for

alternative relief in connection with his contention that the evidence was insufficient to sustain a conviction. On that contention, he sought only a judgment of acquittal.

The modification decision was contrary to the decision of this Court in the **Sapir case.**

In **Karn v. United States, 158 F. 2d 568** (9th Cir.), the Court held:

> "When the motion for a directed verdict was made, the trial judge, as a matter of law, should have instruced the jury to render a verdict of acquittal. **The right of appellant to a verdict of acquittal fully matured when he made his motion.** To remand the case with directions to grant new trial would, in our judgment, be a **serious invasion of rights which accrued to him** in the lower court and would strip away, without just cause, the real effectiveness of a reversal on appeal in cases of this kind.
>
> "While adhering to the view that this court may remand the case with directions to discharge the appellant, we are also persuaded that Rule 29 of the Federal Rules of Criminal Procedure is properly applicable to this situation, even though the trial was held before the new criminal rules became effective, since this proceeding is 'pending' within the meaning of Rule 59. See United States v. Bozza, 3 Cir., 155 F. 2d 592, 596. This simplified procedure is suitable to the case at bar.
>
> "The judgment of the district court is reversed and the cause remanded to the district court with directions to vacate the judgment of sentence herein and to enter a judgment of acquittal of the appellant."

In Foot Note 2, the Court held:

> "The power of an appellate court **to direct the lower court to do what in law it should have done** was admitted in the early case of Ballew v. United States, 160 U.S. 187, 16 S. Ct. 263, 40 L. Ed. 388, and then denied in Slocum v. New York Life Ins. Co., supra, but with four justices dissenting. Several years later the Supreme Court re-examined the rule, and in Baltimore & Co. Line v. Redmand, 295 U.S. 654, 659, 55 S. Ct. 890, 79 L. Ed. 1636, approved the views expressed by Justice Hughes in the dissent in the Slocum case. Such a procedure is not in derogation of the jury's powers, since the trial judge, when faced with a motion for a directed verdict,
>
> . . . . .
>
> must decide a **question of law.** That question is whether there is any evidence from which the jury could find a verdict. The erroneous decision of a trial judge cannot convert that question of law into a question of fact. It remains a question of law properly to be decided by the appellate court, and when so decided, (as it is here) there remains nothing to be done by the district court save enter a judgment of acquittal. For a particularly enlightening discussion see (citing many cases)."

The modification decision in the case at bar is contrary to the decision in the **Karn case.**

In the case at bar, the Court of Appeals, in its original judgment, determined that it was "error to submit the case to the jury" and directed the entry of judgment of acquittal. This was predicated on the ground that the evidence was insufficient to submit to the jury the question of the existence of a subsidiary conspiracy which would

prolong the operation of the statute of limitations of the character contemplated by the **Grunewald and Krulewitch cases.** The case was not reversed for errors infecting the trial.

Under this decision, the Petitioner was entitled, in the District Court, to the entry of a judgment of acquittal. His right thereto "matured" at that time and the Court of Appeals so determined.

The subsequent petition for a modification of the judgment to direct a new trial, was in legal contemplation, the equivalent of a motion for a new trial in the United States District Court after the entry of a judgment of acquittal and the equivalent of an appeal by the Government from a judgment of acquittal. **(Justice Douglas' Opinion in the Sapir case.)** The Government could not have moved for a new trial in the District Court if the Court had, as it should have done, entered a verdict of acquittal and the Government could not have appealed if the District Court had, as it should have done, entered a judgment of acquittal and that is true whether the judgment was right or wrong. **(Green v. U. S., 155 U.S. 184.)**

The law, as expressed in the **Sapir and Karn cases,** is especially applicable in the case at bar because the ground upon which the new trial was sought and allowed by the Court of Appeals was that the case "might have been tried" upon an "alternative theory." This is indeed granting to the Government "another go at this citizen" although

the Government did not seek submission on an alternative theory in the District Court.

If the Court of Appeals had affirmed the conviction, Petitioner could not have petitioned the Court of Appeals to send the case back for a new trial upon another theory of defense which he could have, but did not, urge in the District Court There is no apparent reason why the Government should be granted this extraordinary right, particularly in a criminal case in which a defendant is entitled to the constitutional prohibition against double jeopardy and the Government is denied the right to move for a new trial in the District Court and is denied the right to appeal from a judgment of acquittal.

The Court below held that the **Sapir case** was not applicable and distinguished it from the case at bar. It said:

> "In the Sapir case the Court of Appeals held that the evidence 'did not establish an essential element of the offense charged' and that the trial court should have entered a judgment of acquittal.
>
> . . . . .
>
> "But in the case before us we did no such thing. We held that the case was submitted to the jury on an impermissible theory. The jury was simply not properly instructed. . . .
>
> " . . . this was not a reversal on the basis of lack of evidence . . ."

We respectfully submit that this is an erroneous statement of the original decision. The reversal

was not based upon any alleged erroneous instruction. Appellant did not challenge the accuracy of the instructions. Appellant merely contended that there was no evidence to establish the alleged subsidiary conspiracy and, therefore, the prosecution was barred. The Court below, in its original Opinion, held that the evidence did not establish a subsidiary conspiracy that would extend the operation of the statute of limitations and that "it was error to permit this case to go to the jury."

The Court reversed with direction to enter judgment of acquittal for the very same reason that the Supreme Court reversed with directions for judgment of acquittal in the **Sapir case** because the evidence "did not establish an essential element of the offense charged."

In the case at bar, it was essential for the Government to establish the existence of the subsidiary conspiracy which would prolong the operation of the statute of limitations without which the prosecution was barred. The Court held that the evidence, when measured by the requirements of the **Grunewald and Krulewitch cases,** did not establish that subsidiary conspiracy.

Consequently, there is no valid distinction between the **sapir case** and the case at bar and its decision modifying the judgment insofar as it directs a new trial instead of directing the entry of a judgment of acquittal is contrary to the law as laid down by this Court in the **Sapir case.**

In **Green v. United States, 355 U.S. 184—78 S. Ct. 221,** the Court held:

> "The constitutional prohibition against 'double jeopardy' was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense.
>
> . . . . .
>
> "The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempted to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.
>
> . . . . .
>
> "Thus it is one of the elemental principles of our criminal law that the Government cannote secure a new trial by means of an appeal even though an acquittal may appear to be erroneous. United States v. Ball, supra; Peters v. Hobby, 349 U.S. 331, 344-345, 75 S. Ct. 790, 796, 99 L.Ed. 1129. Cfg. Kepner v. United States, 195 U.S. 100, 24 S.Ct. 797, 49 L.Ed. 114; United States v. Sanges, 144 U.S. 310, 12 S. Ct. 609, 36 L.Ed. 445.
>
> . . . . .
>
> "Nevertheless the Government contends that Green 'waived' his constitutional defense of former jeopardy to a second prosecution on the first degree murder charge by making a **successful** appeal of his improper conviction of second degree murder. We cannot accept this paradoxical contention. 'Waiver' is a vague term used for a great variety of purposes, good and bad, in the law. In any normal sense, how-

ever, it connotes some kind of voluntary knowing relinquishment of a right.

. . . . .

"And as Mr. Justice Holmes observed, with regard to this same matter in Kepner v. United States, 195 U.S. 100, at page 135, 24 S.Ct. 797, at page 897, 49 L.Ed. 114: 'Usually no such waiver is expressed or thought of. Moreover, it cannot be imagined that the law would deny to a prisoner the correction of a fatal error unless he should waive other rights so important as to be saved by an express clause in the Constitution of the United States."

II.

The Direction of a New Trial was not an Appropriate and Just Judgment, under the Circumstances of this Case, and the Court Below has so far Departed from the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of this Court's Power of Supervision.

The United States District Court, in submitting the case to the Jury, gave a summary instruction that the primary conspiracy, alleged in the indictment, was consummated on March 15, 1946, when the last individual income tax return of Seijas was filed and that the prosecution was, therefore, barred by the statute of limitations (Tr. of Rec. pp. 1807-8).

The Court instructed further that there must be a verdict of not guilty unless the Government established a subsidiary conspiracy of the character described in the **Grunewald and Krulewitch cases** which would have the effect of prolonging the oper-

ation of the statute of limitations. The case went to the Jury on these instructions. The Government did not object or take exception to these instructions and did not request any instructions which would submit the case to the Jury on any alternative or other theory as required by **Rule 30, Federal Rules of Criminal Procedure.**

On the appeal, the Government did not, in its brief or in oral argument, contend that the case should have been submitted upon any alternative or other theory. It presented the "alternative theory" contention for the first time in its petition for modification, seeking a new trial after the Court of Appeals had ajudicated that the Petitioner was entitled, as a matter of law, to the direction of a judgment of acquittal and that it was "error to submit the case to the jury" because there was no evidence of the existence of any subsidiary conspiracy that would prolong the operation of the statute of limitations.

Under Rule 30 of the Federal Rules of Criminal Procedure, and the Rules established by the decisions of this and other Courts, the action of the Court below, in making the Modification Order, so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Rule 30 of the Federal Rules of Criminal Procedure provides as follows:

"**No party** may assign as error any portion

> of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection." (Emphasis supplied).

The rule says that **"no party"** may assign as error, etc. This clearly precludes the Government, Appellee, as well as the defendant.

In **United States v. Hoth, 207 F. 2d 386** (9th Cir.), this Court held:

> "The United States is not entitled, any more than the ordinary litigant, to raise questions on the appeal not presented or suggested below."

In **Carter Carburetor Corp. v. Riley,** 186 F. 2d **148** (8th Cir.), the Court held:

> "The court's **instructions, not** being **excepted to** by either party, **became the law of the case** and we must determine the question of the sufficiency of the evidence by the law as so announced." (Citing cases).

In **Bateman v. United States, 212 F. 2d 61** (9th Cir), this Court held:

> "Under Rule 30 of the Federal Rules of Criminal Procedure, 18 U.S.C.A., failure to except to an instruction on the ground urged on appeal **forecloses review** of the question. Berenbeim v. United States, 10 Cir., 1947, 164 F. 2d 679."

In **Mitchell v. United States, 213 F. 2d 951** (9th Cir.), the appellant attempted to assert error in the failure of the Trial Judge to instruct the jury re effect of a prior acquittal on criminal charges for

tax evasion. The Court refused to consider the alleged error and held:

> "The instruction complained of dealt with a **special fact-situation** of the case at bar, and was **not of a 'stock' nature.** It was therefore of a type that comes peculiarly within the sweep of **Rule 30,** as was pointed out at some length by us in the recent cases of . . ." (Citing 9th Cir. cases).

In **Reidy v. Myntti, 116 F. 2d 725** (9th Cir.), the Trial Court gave an instruction to the jury which represented

> "the theory upon which the trial was had."

On appeal, the defendant questioned the instruction. The Court held:

> "This theory of the case, accepted by both parties at the trial, **cannot be questioned for the first time on appeal.** New York, L. E. & W. R. Co. v. Estill, 147 U.S. 591, 13 S. Ct. 444, 37 L. Ed. 292"

The defendant also questioned the sufficiency of the evidence to support the amount of the recovery. The Court held:

> "We deem it sufficient to say in answer to this specification of error that the question of the sufficiency of evidence in this regard was **not raised in the trial court, nor** is there any sufficient **assignment of error** raising the question."

The following cases are to the same effect:

> Zamloch v. U.S., 193 F. 2d, 889 (9th Cir.);
> Kobey v. U.S., 208 F.2d 583 (9th Cir.);
> U. S. v. Furlong, 194 F. 2d 1 (7th Cir.), holding Court **"powerless"** to consider objection to instruction;

Enriquez v. U. S., 188 F. 2d 313 (9th Cir.);
Berra v. U. S., 351 U.S. 131—76 S. Ct. 685.

It is also well settled that **a new contention cannot be presented for the first time by a petition for re-hearing.**

Independent Wireless Telegraph Co. v. Radio Corporation of America, 270 U.S. 84;
United States v. Achilli, 234 F. 2d 797 (7th Cir), Affirmed 353 U.S. 373.

The Modification Order directing a new trial instead of directing a judgment of acquittal was made in violation of the foregoing rules. The violation of these rules is particularly objectionable and serious in criminal cases, under the conditions prevailing in this case, because it results in depriving a defendant of his constitutional protection against double jeopardy and grants the Government rights equivalent to a motion for a new trial after a judgment of acquittal in criminal cases, when the law denies these rights to the Government.

When a defendant in a criminal case becomes entitled, as a matter of law to a judgment of acquittal and the right has accrued, it is not "just" or "appropriate" to subject him to another trial so that he can be prosecuted on another "theory" for the same offense.

The fortuitous circumstance that the Trial Judge erroneously denied the defendant the judgment of acquittal to which he was entitled; as a matter of law, cannot, and should not, affect his

right to acquittal by a direction of the United States Court of Appeals.

It is "just" and "appropriate" that the Court of Appeals should direct the Trial Court to do that which it should have done as a matter of law.

If the Government cannot have a new trial in the District Court or an appeal from a judgment of acquittal, it is not "just" or "appropriate" that it should have a new trial by reason of the fortuitous circumstance that the Trial Court erroneously denied defendant a judgment of acquittal when the Court of Appeals reverses because of the Trial Court's failure to grant defendant the judgment of acquittal to which he was entitled as a matter of law.

The Government should not be allowed to acquire rights by reason of the Trial Court's failure to do that which the law required it to do in the first instance.

The action of the Court of Appeals in this case raises a far more serious issue than the possible guilt of the petitioner. The issue is the proper standard to which the Government should be held in criminal prosecution by law and by the Courts. To deprive a citizen of his liberty the law places upon the Government the burden of producing evidence legally sufficient to support conviction. This includes evidence establishing that prosecution is not barred by the statute of limitations. When the Government fails to carry this burden upon the

trial and the defendant becomes entitled as a matter of law to a judgment of acquittal, that should end the matter. The defendant should not then be subjected to another trial on another theory by reason of the fortuitous circumstance that the Trial Court erroneously failed to grant a judgment of acquittal. The Government should not be relieved from the requirements of **Rule 30 of the Federal Rules of Criminal Procedure** and from any of the other rules referred to above governing the proper presentation of questions for review in the Appellate Court. The Government should not be permitted to insist upon affirmance of the judgment of conviction and when defeated in this attempt, to seek "another go at the citizen" upon another theory.

The action of the Court below, which relieved the Government from the operation of all of the Rules discussed above, calls for the exercise of this Court's supervisory powers so that adherence to these Rules by the Government will be made mandatory upon the Government as it is upon the defendant.

In **Pollard v. United States, 352 U.S. 354,** in the dissenting Opinion of Chief Justice Warren, concurred in by Justices Black, Douglas and Brennan, he said:

> "The conclusion that the condonation of this succession of procedural shortcomings represents a restriction of petitioner's rights is inescapable. This Court has often said that

such departures from accepted standards should not be permitted—that to do so encourages looseness in many ways."

The observation is particularly applicable in the case at bar because the condonation by the Court below of the violation of the rules discussed above, results in depriving defendant of the constitutional guarantee against double jeopardy by subjecting him to another trial for the same offense although he was, at the conclusion of the trial, entitled, as a matter of law, to a judgment of acquittal.

In the Government's petition for modification, it asserts that the theory on which the case was submitted to the Jury was contrary to the law as laid down in **United States v. Beacon Brass Co., 344 U.S. 43,** but it did not request any instruction for submission of the case to the Jury on the theory involved in the **Beacon Brass Co. case** and it did not, in its brief in the Court of Appeals or in oral argument, contend that the case was submitted on a theory contrary to the **Beacon Brass Co. case** or that the case might have been submitted on such theory. Reliance on the **Beacon Brass Co. case** was asserted, for the first time, in the Government's petition for modification.

In the petition for modification (p. 6), the Government attempted to excuse its failure to request instructions for submission of the case on the alleged alternative theory on the ground that

this Court had not, at the time of the Trial, decided the **Grunewald case** and it says:

> "accordingly the Government made no objections to the Trial Court's instructions."

The excuse is untenable. The instructions given by the Court were in harmony with the law as it was expressed by the United States Court of Appeals for the Second Circuit in the **Grunewald case** and the principles were affirmed and reiterated by this Court. It was only decided by this Court in the **Grunewald case** that under the allegations of the indictment in that case and the evidence, the defendant was entitled to have the case submitted on an additional or alternative theory and that the instructions did not adequately present that alternative theory. The defendant raised the question in the trial court and assigned the error in the brief. But the principles established by the **Krulewitch and Lutwak cases,** as recognized by the Court of Appeals in the Second Circuit, were affirmed and emphasized.

In the case at bar, the District Court had before it the decision of the Circuit Court of Appeals of the Second Circuit when the case was submitted to the Jury and it formulated the instructions in accordance therewith. **The Government acquiesced in those instructions and it did not request any instructions for the submission of the case to the Jury on any additional or alternative theory.**

Moreover, when the Government wrote its brief.

in this case, this Court had already decided the **Grunewald case.** The Government discussed the decision in its brief, but did not argue that the case should, or might have been, tried on an "alternative theory." It did not confess error and ask for a new trial. It only urged that the judgment be affirmed.

There is not the slightest suggestion in the Government's brief in the Court of Appeals that the case was submitted on erroneous instructions, or on an erroneous theory. It argued only that the evidence was sufficient to go to the jury. The Court below held that the evidence was insufficient. **It did not in the Opinion modifying the judgment reverse itself on that issue.**

III.

The United States District Court for the Western District of Washington, Southern Division, was without Jurisdiction of the Offense.

The Grand Jury that returned the indictment in this case was created as follows:

On February 3, 1953, on motion of the United States Attorney, the United States District Court for the Western District of Washington, **Southern** Division, ordered the impaneling of a Grand Jury for the **Southern Division** of the Western District. (Tr. of Rec. 23).

On February 26, 1953, when the Grand Jury was being impaneled, the Court ruled that only **residents**

of the Southern Division were qualified to act as Grand Jurors (Tr. of Rec. 27).

After the Grand Jury was impaneled and sworn, **the Court instructed the Grand Jury that it could only consider offenses committed in the Southern Division** and that it could consider offenses in the Northern Division **only on stipulation** (Tr. of Rec. 50, 51, 52).

The indictment in this case was returned by the Grand Jury impaneled by the Court of the Southern Division and the case was tried in the Southern Division.

It is settled by a series of decisions that a Grand Jury, so impaneled, has no jurisdiction to consider offenses committed in another Division in the absence of stipulation and the Court to which the indictment is returned has no jurisdiction of the offense.

Borgia v. United States, 78 F. 2d 550 (9th Cir.);
United States v. Tait, 6 F. 2d 942;
United States v. Chennault, 230 Fed. 942;
United States v. Beaugh, 2 F. 2d 378.

This rule was not questioned by the Government.

The question that presented itself was whether the offense was committed in the Southern Division.

It is also settled that a conspiracy case may be prosecuted either in the jurisdiction where the

conspiracy was entered into or the jurisdiction in which an overt act was committed in furtherance of the conspiracy.

The indictment in this case alleges that the **conspiracy** was **formed** in Seattle, Washington, in the **Northern Division.** The question then remains, was an overt act committed in the **Southern Division?** (Tr. of Rec. 4).

The indictment alleges the commission of thirty-three overt acts (Tr. of Rec. 6 to 18).

Only seven of the acts are alleged to have been committed within six years prior to the indictment. These are 24, 26, 29, 30, 31, 32 and 33 (Tr. of Rec. 15 to 18).

It is alleged in the indictment that **all of these seven acts were committed in Seattle, Washington, Northern Division.** Consequently, if these were the only overt acts alleged, the District Court for the Southern Division would be without jurisdiction of the offense.

Of the remaining twenty-six alleged overt acts (all barred by the statute of limitations), seven of the acts, numbered 14 to 20 inclusive, are alleged to have been **committed in Tacoma,** Washington, **Southern Division.** They all consist of allegations of the filing of partnership information returns and some of Seijas' individual returns in the Collector's Office in Tacoma. All of them were committed more than six years prior to the indictment. **They are the only acts committed in the Southern Division.**

The question for determination, therefore, was whether overt acts committed within the jurisdiction more than six years prior to the indictment and barred by the statute of limitations can clothe the Court of the Southern Division with jurisdiction?

In the District Court, petitioner contended that the Southern Division of the Court was without jurisdiction.

The United States District Court rejected this contention and held that jurisdiction could be predicated upon overt acts committed within the jurisdiction although these overt acts were barred by the statute of limitations.

The Court of Appeals did not, in the original Opinion, pass upon the contention. But since it considered the case on the merits, it must be assumed that it rejected Appellant's contention **sub silentio.** But in the Opinion rendered February 26, 1959, the Court said:

> "We agree with the Government's contention that since some earlier overt acts (barred by the statute of limitations) were committed in the Southern Division while the later acts (not barred by the statute of limitations) took place in the Northern Division, venue requirements were satisfied, notwithstanding only the later acts satisfy the requirements of the statute of limitations." (Tr. of Rec. 1942, App. to this br., p. 70).

In the Government's petition for modification and the brief submitted in answer to Petitioner's

Petition for Rehearing, the Government **expressly disclaimed** that the indictment charges conspiracy to attempt to evade **by filing false returns** and insisted that the indictment only charged conspiracy to attempt to evade **by making false statements and submitting false records to Government Agents** as set forth in paragraph D of the indictment (Tr. of Rec. 5).

The Government's petition for modification says (p. 3):

> "These acts (referring to the filing of false returns) are **not even alleged as means of evasion** in the indictment, but are relegated to the category of overt acts. The **means of evasion alleged** in the charging part of the indictment are: by **furnishing officers and employees of the Treasury Department false books and records, and false financial statements,** . . . for the purpose of concealing . . . .'"

The Government assumed this position to avoid the force of the instruction that the primary conspiracy was consummated and the statute of limitations began to run upon the filing of Seijas' last individual return on March 15, 1943. This instruction was in accordance with the decision of this Court in the **Grunewald case.** This Court said:

> "The tax evasion cases were governed by a six year statute of limitations, which began to run when the last return, pertaining to the year 1946, was filed by the taxpayers."

Since the Government insists that the indictment only charged attempted evasion by making

false statements and submitting false records and not by filing false returns, the overt acts, numbered 14 to 20 inclusive, consisting of the filing of returns (barred by the statute of limitations) were **irrelevant to the conspiracy which the Government now contends is the basis of the prosecution.** The filing of returns would be relevant to and in furtherance of a conspiracy to attempt to evade by filing false returns, but are **not relevant to a conspiracy which merely contemplates making false statements and submitting false records** even if they were not barred by the statute of limitations.

In **Yates v. United States, 354 U.S. 298,** this Court held that an overt act must be **relevant to the particular objective of the conspiracy.** In that case, the indictment charged conspiracy to violate the Smith Act by "advocating" the over-throw of the Government by force and by "organizing" a communist organization to teach the over-throw of the Government.

Only two overt acts were committed within the statutory period of limitations. The Court reversed the conviction because the evidence only established one of the objectives, namely, "advocating" the over-throw of the Government by force, but it was impossible to tell from the verdict of the Jury whether the two overt acts were relevant to the "advocating" objective or the "organizing" objective.

In the case at bar, since the Government insists

that the indictment charged only one objective, namely, conspiracy to attempt to evade by making false statements and submitting false records to Government employees, there had to be overt acts committed within the statute of limitations **relevant to that particular objective.**

The filing of the returns were not overt acts relevant to that objective. The offense of attempted evasion by making false statements and submitting false records can be committed even without the filing of any returns. **(Beacon Brass Co. case).** The conspiracy charged in paragraph D does not depend on the filing of returns.

But whether relevant or not to the object of the conspiracy as now claimed by the Government, barred overt acts committed in the Southern Division, which could not, in any event, sustain a conviction for conspiracy, could not clothe the Court with jurisdiction.

The District Court charged the Jury that at least one of the overt acts had to be committed

> "at Tacoma within the Southern Division (Tr. of Rec. 1794);

that

> "the burden is on the Government to prove . . . . either the defendant Forman or any other member of the alleged conspiracy **committed at Tacoma, within the Southern Division** of this Court, any one or more of the overt acts alleged in the indictment," (Tr. of Rec. 1799).
> ". . . . that one or more of the alleged con-

spirators committed an overt act or acts **within a period of six years prior to the filing of the indictment"** (Tr. of Rec. 1809).

There had to be a concurrence of two elements:

(a) an overt act committed in the Southern Division; and

(b) within six years prior to indictment.

The indictment alleges on its face that the only acts committed in **Tacoma, in the Southern Division,** were barred by the statute of limitation, being more than six years before the indictment.

In a conspiracy case, the allegation of overt acts barred by the statute of limitations is clearly "surplusage" because they could not sustain a conviction.

In **Bridges v. United States, 346 U.S. 209,** where the statute of limitation was involved, the Court held:

> "The insertion of surplus words in the indictment does not change the nature of the offense charged."

In **Ford v. United States, 273 U.S. 593,** the Court said that "surplusage" in an indictment

> "is a useless averment, is innocuous and may be ignored."

Since the barred overt acts could not sustain a conviction, the allegation of these acts constitute "surplusage" and is innocuous for any purpose, whether it be to state an offense or to clothe the Court with jurisdiction.

In **United States v. Perlstein, 126 F. 2d 789,** (3rd Cir.) the Court recognized that

> ". . . . it must always be alleged and proved that the crime was committed prior to the date of the indictment, within the period of limitation, **and within the jurisdiction of the Court."** (Emphasis added)

In **Hyde v. United States, 225 U.S. 347,** this Court had under consideration the question of jurisdiction in a case where the conspiracy was formed out of the jurisdiction, but an overt act was committed within the jurisdiction. The Court sustained the jurisdiction, but said:

> " 'The conspiracy must have existed in the District of Columbia, and it must have existed and some overt act in pursuance of it must have been committed within three years next before the filing of the indictment.' "

There is an implication that there had to be concurrence of an act committed within the jurisdiction and within the statutory period.

The question involved is one of jurisdiction and not merely venue because the Grand Jury had no power or authority to consider the alleged offense committed in the Northern Division. The Grand Jury had limited authority. It was selected, empaneled and instructed specifically to consider only offenses committed within the Southern Division and that it could consider cases in the Northern Division only on stipulation. Consequently, the indictment returned by that Grand Jury for an

offense committed within the Northern Division was a nullity and did not clothe the Court with jurisdiction to try the defendant.

Unless jurisdiction in conspiracy cases is limited to overt acts committed:

(a) within the jurisdiction; and

(b) within the period of the statute of limitations,

defendant in conspiracy cases could in many instances be deprived of due process.

In conspiracy cases, a defendant is subjected to unusual hardship and hazards that are inherent in such prosecutions. Under the Government's contention, a defendant may be compelled to disprove an alleged overt act committed ten, fifteen or twenty years prior to indictment by (a) persons other than the defendant, (b) who may be unknown to him, (c) of which he has no knowledge, and (d) committed thousands of miles from the place of trial. He would be prevented, by reason of the lapse of time, from obtaining evidence with which to disprove such overt act.

The same considerations which preclude prosecution on an overt act barred by the statute of limitations, should also preclude jurisdiction when predicated on an act barred by the statute of limitations.

CONCLUSION

It is respectfully submitted that the Petition should be granted, and the Writ issued.

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APPENDIX 1

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

William R. Forman, Appellant,	)	
vs.	)	No. 15,324
	)	Sept. 15, 1958
United States of America, Appellee.	)	

Appeal from the United States District Court for the Western District of Washington, Southern Division.

Before HEALY, POPE and FEE, Circuit Judges.

POPE, Circuit Judge.

Appellant Forman was found guilty and sentenced under the fifteenth count of a fifteen count indictment returned against him and one Seijas. The first fourteen counts of the indictment stated charges against Seijas only, and they are not involved in this appeal. In the fifteenth count it was charged that Seijas and Forman entered into a conspiracy to defraud the United States and to violate certain sections of the Internal Revenue Code and the Criminal Code, among them section 145(b) of the Internal Revenue Code (1939),[1] re-

[1] "(b) Failure to collect and pay over tax, or attempt to defeat or evade tax. Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for any pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by

lating to attempts to evade or defeat income tax. As the case is presented here the key portions of this count were stated in paragraphs "C" and "D", as follows:

"C. To violate Section 145(b) of the Internal Revenue Code, 26 U.S.C., Section 145(b), by knowingly and willfully attempting to defraud and evade a large portion of the income taxes owed by Armador A. Seijas and his wife, Betty L. Seijas, and others to the United States for the years 1942 to 1945, inclusive, upon their share of the unreported income of the afore-mentioned partnerships.

"D. To violate Section 1001 of the New Criminal Code, 18 U.S.C., Section 1001, and Section 145(b) of the Internal Revenue Code, 26 U.S.C., Section 145(b), by furnishing officers and employees of the Treasury Department false books and records, and false financial statements, and by making false statements to such officers and employees for the purpose of concealing from the Treasury Department their share of the unreported income of the aforesaid partnerships, and for the purpose of concealing from the Treasury Department the true income tax liability of Armador A. Seijas and his wife, Betty L. Seijas, for the years 1942 to 1945, inclusive."

this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution." At the trial the violation of sections other than this one were removed from consideration of the jury as a basis of conspiracy.

The Count listed 33 overt acts alleged to have been committed in furtherance of the conspiracy.

Seijas in a separate trial was found guilty, under counts 9 through 13, of substantive offenses pertaining to the evasion or attempt to evade his tax and that of his wife for the years 1946 through 1948. He pleaded guilty to the charge against him in count 15. Forman was tried alone upon that count and Seijas, who was then serving his sentence under the other counts, was produced as a witness for the Government.

The evidence tended to show that during the years 1941-1945, inclusive, Seijas and Forman, as partners, were conducting the business of operating pinball machines in Kitsap County, Washington; that they carried on this business under an arrangement whereby the pinball machines were placed in taverns and other locations; that the coins in the machines were collected by employees of the partnership and the amounts so taken would be divided equally between the partnership and the proprietor of the pinball location; that instead of accounting for all of the collections made, the collectors by direction of the partners held out a portion of the actual amounts collected and turned over to the partnership bookkeeper for entry in the partnership books only a portion of the actual collections; that in this manner some $172,400 was held out of the pinball receipts during the years 1942 through 1945; that this amount was neither reported to the location owners nor entered in the

partnership books, nor reflected in the income tax returns,—it was split between Forman and Seijas neither of whom reported any part of these sums upon his own tax returns.

Forman's participation in the setting up of this arrangement and in the handling of the partnership books and the making of the partnership information returns, so as to conceal the receipt of these funds during the years 1942 to 1945, was proven by credible evidence, and there was abundant proof of Forman's participation in a conspiracy such as that described in paragraph C quoted above, namely, one to defraud and evade Seijas' income taxes for the years 1942 through 1945.

The outcome of this case, however, does not turn upon any such question since the court instructed the jury that a conspiracy to commit the offenses referred to in paragraphs C and D of the indictment, insofar as they were for the purpose of evading the tax liability of Seijas and wife, were subject to a six year period of limitation, and prosecution must be commenced within six years of the last overt act in furtherance of such conspiracy. The court stated to the jury:

"I charge you that the conspiracy to evade the tax liability of defendant Seijas and his wife, if any there be, was consummated upon the filing of the individual tax returns of Seijas and his wife for the year 1945 which was filed in March, 1946, and the statute of limitations would run from that time." The indictment was filed November 19, 1953.

However, as bearing upon that portion of the indictment, quoted above as paragraph D, and relating to a conspiracy to violate section 145(b) of the Internal Revenue Code, "by furnishing false books and records and making false statements, for the purpose of concealing . . . their share of the unreported income . . . and for the purpose of concealing . . . the true income tax liability" of Seijas and his wife, the court charged the jury as follows: "If you find that the defendant Seijas and Forman conspired to attempt to evade the tax liability of Seijas and his wife and others for the years 1942 to 1945, inclusive, you must find the defendant Forman not guilty unless you are convinced beyond a reasonable doubt that they also conspired to conceal the alleged conspiracy in order to prevent prosecution therefor and that such additional conspiracy was a continuing one. You cannot imply that there was a continuing conspiracy to conceal the offense from the fact that they may have conspired to attempt to evade the tax liability of Seijas and wife. That is to say, the mere fact that they may have conspired to evade the tax liability of Seijas and his wife for the years in question, if it be a fact, does not warrant the conclusion that they also conspired to conceal the commission of the offense. You would have to be convinced beyond a reasonable doubt that they actually conspired to conceal the conspiracy and that they committed an overt act or acts in furtherance of such subsidiary conspiracy. As previ-

ously stated, the understanding or agreement for such conspiracy need not have been entered into by written or formal oral expression, but may be determined from a consideration of the conduct and statements of the parties and all of the evidence as shown by the evidence in the case."[2] It will thus be noted that the jury were told that it was not sufficient merely to prove conspiracy to attempt to evade tax liability of Seijas and wife from 1942 to 1945, inclusive, but that the jury must be convinced beyond a reasonable doubt that they also conspired to conceal the conspiracy to evade the tax liability in order to prevent prosecution thereof and that such additional conspiracy was a continuing one. The court further made this point very clear by concluding its charge in respect to these matters as follows:

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[2] This was followed by the following portion of the charge which contains the part previously quoted: "If you find that the defendants only conspired to attempt to evade the tax liability of defendant Seijas and his wife and did not form the additional conspiracy to conceal the same, then I charge you that the conspiracy to evade the tax liability of defendant Seijas and his wife, if any there be, was consummated upon the filing of the individual tax return of Seijas and his wife for the year 1945 which was filed in March, 1946, and the statutes of limitations would run from that time, and if you so find, your verdict would have to be not guilty.

"If you find that there was no subsidiary conspiracy to conceal as I have just outlined it to you, but acts of concealment were thereafter committed as an after-thought and were conceived after the filing of the returns in March, 1946, then, of course, your verdict must be for the defendant Forman."

"Summarizing with respect to the statute of limitations, you must first find that Forman knowingly and wilfully conspired with Seijas to attempt to evade the tax liability of Seijas, Mrs. Seijas and others;

"Second, that part of this conspiracy was to make continuing efforts to avoid detection and prosecution under the condition just referred to;

"Third, that one or more of the alleged conspirators committed an overt act or acts within a period of six years prior to the filing of the indictment therein in furtherance of the conspiracy and during its continuance to accomplish the object of the conspiracy just referred to; namely, attempted evasion of tax liability of Seijas and others.

"If you cannot answer all three of these questions in the affirmative, as shown by the evidence beyond a reasonable doubt, then you must return a verdict of not guilty."

Appellant argues that the court should have granted his motions for judgment of acquittal, contending that there was not sufficient evidence to establish: "(a) a conspiracy between defendant and Seijas to evade Seijas' tax liability; and (b) a subsidiary conspiracy to conceal the aforesaid conspiracy."

As above indicated, we think the proof of the conspiracy to evade Seijas' tax liability was entirely adequate and so strong as to be almost overwhelming. Actually, as their collector testified,

they "stole" from the machines. They were engaged in perpetrating a fraud upon the location operators who were supposed to receive half of the proceeds. They sent false reports to their own bookkeeper as to the partnership gross receipts. This led to the false partnership returns and the evasion of the taxes owing by Seijas.

Clear as this evidence of their guilt of a conspiracy to evade Seijas' taxes is, it is not the important part of this suit in view of the fact that this portion of the conspiracy was consummated, as the court told the jury, on the filing of Seijas' tax returns in March, 1946. As the court's instructions stated, if this is all there was to the conspiracy, the statute of limitations would run from that time and the prosecution would be barred.

As to the contention that there was no evidence to prove that there was a subsidiary conspiracy to conceal, or to prove that the conspiracy itself included the actual conspiracy to accomplish not only the evasion of the taxes but the concealment of that evasion, appellant leans heavily upon the testimony given by defense witnesses that Forman ceased all participation in the pinball machine operations and in his association with Seijas in that business August 8, 1946. At that time Forman sold his one-half interest in the pinball machine partnership business to one Morin and written agreements were executed evidencing the assignment by Forman of 49% of his interest to Morin and 1% to Seijas. At the same time Seijas

and Morin adopted the articles of copartnership formerly executed between Forman and Seijas which recited that Morin was accepted as a partner by Seijas instead of Forman. There was also evidence to indicate that the "hold out" practices previously carried on between Seijas and Forman ceased and terminated about that time.

The Government claimed on the other hand that notwithstanding the execution of these instruments, Forman remained a secret partner in respect to Seijas' interest in the pinball business. Thus it was shown that half of $30,000 received from Morin for sale of Forman's interest to him was paid over to Seijas who testified that it was agreed that Forman was to have a secret one-half interest in Seijas' 51% of the Seijas-Morin partnership.[3] Appellant contends that he has established by "overwhelming" evidence that the payment of the $15,000 was a loan from Forman to Seijas and not a division of the purchase price paid by Morin.

Wholly apart from this dispute as to whether Forman did or did not continue to hold a secret interest in the pinball business, we think there was adequate proof, although circumstantial in character, of the Government's contention that there was an actual subsidiary conspiracy to conceal.

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[3] This testimony was confirmed by a written agreement, dated August 9, 1946, signed by Seijas and Forman, reciting that "W. R. Forman is the owner and partner of the remaining 51% in equal shares with Army Seijas."

The whole common enterprise from beginning to end was marked by efforts of concealment. When the parties first opened up their business in Kitsap County they concealed their part in it by having the licenses to operate the machines issued in the names of other persons. These persons were employed simply to lend their names. The licenses were taken in the names of United Amusement Company and Bremerton Amusement Company, which were the names under which Seijas and Forman were then doing business. During this period Seijas and Forman undertook other enterprises and in connection with those their actual activities were concealed by subterfuge and misrepresentations. They acquired an enterprise known as "Dock Concessions", put friends in charge to operate it with percentage interests to them, and made provisions that Forman was to be a silent partner. At the same time Seijas had a silent one-half interest in Forman's silent one-half interest. Seijas bought out some interests of one Heberling in three other pinball routes and Forman and Seijas had a secret agreement that they each had equal interests in the routes purchased. Seijas divided what he collected with Forman and this continued after September 1, 1946, when the sale to Morin became operative.

In 1950 internal revenue agents began an investigation of Seijas, and between that date and the time when the indictment was returned on November 19, 1953, both Seijas and Forman gave numerous false statements to the agents denying

any unreported income from the 1942-1945 pinball operations. Typical of this sort of thing was the conduct of Forman listed in overt act No. 29 of the indictment as follows:

"On or about September 1, 1948, in Seattle, Washington, William R. Forman concealed from an officer and employee of the Treasury Department of the United States engaged in an official re-examination of his and his wife's personal income tax returns for the year 1945 that during that year he received income from the afore-mentioned partnerships with Armador S. Seijas in addition to the amounts shown on the information returns filed by said partnerships."

In an audit of the February 28, 1947 return, Seijas and Forman gave the internal revenue agent the books and records of the partnership for 1944-1945 representing that they showed all the receipts for those years. They concealed the holdout pinball income. The same thing was done with another investigating agent in 1948 who received the first partnership records. These transactions are listed among the overt acts specified in the indictment. Throughout the periods here mentioned Seijas and Forman occupied the same office space and they were associated together in various theatre enterprises. Up to the time of the indictment and even through the trial Forman and Seijas continued to conceal the interest which Forman had in the Seijas-Morin partnership.

The theory of the Government was plainly that which had been recently accepted and approved in United States v. Grunewald, 2 cir., 233 F. 2d 556, 565. There the court said: "The record contains ample proof of efforts by the conspirators to forestall suspicion and wipe out traces of their operations and these efforts developed later and in 1951 and 1952 into an intensified campaign of concealment." The court then proceeded to distinguish the cases of Krulewitch v. United States, 336 U.S. 440, and Lutwak v. United States, 344 U.S. 604, and concluded: "In the case before us now it was charged in the indictment that one of the terms of the illegal agreement was that continuing efforts would be made 'to avoid detection and prosecution by any governmental body' and much of the proof adduced at the trial was admitted in support of this charge. The jury were instructed that no such term of the agreement could be implied but that they must make a finding based upon the evidence before them, and that if the efforts to conceal were 'no more than an afterthought' they must find defendants not guilty. * * * In Lutwak, despite the fact that the indictment charged an agreement to conceal, there was no evidence to support it. The clear implication is that, if the allegation had been supported by evidence, the court would have arrived at a different conclusion, for it is stated in the opinion, 344 U.S. at page 616, 73 S. Ct. at page 488: 'But there is no statement in the indictment of a single overt act of concealment that was com-

mitted after December 5, 1947, and no substantial evidence of any. Such acts as were set forth and proved were acts that revealed and did not conceal the fraud.' Here the record is replete with evidence of acts of concealment."

Here, also as in the Grunewald case, the record is replete with evidence of acts of concealment, acts participated in by both Forman and Seijas and circumstantial evidence that one of the terms of the illegal agreement was that continuing efforts would be made to avoid detection and prosecution through concealment and false representations to the investigating officers.

As the case was presented to the trial judge, (the trial began July 30, 1956 and the verdict was returned August 15, thereafter), the Grunewald case had but recently been concluded in the court of appeals. The language we have just quoted contains quotations from the Lutwak case which convinced the Second Circuit that the Government's theory was a tenable one. In the Krulewitch case the language of the court would appear to lend color to what the Government contended in the Grunewald case, namely, that in Krulewitch the court was simply refusing to accept a contention that in case of any conspiracy there is an implied agreement and understanding that the conspirators will continue to conceal what they have done. The court said: "We are not persuaded to adopt the Government's implicit conspiracy theory which in all criminal conspiracy cases would create auto-

matically a further breach of the general rule against the admissions of hearsay evidence."[4]

However, we possess an advantage here that the trial court did not have. After the court below was required to rule upon these questions, and to frame its instructions to the jury, the decision of the court of appeals in the Grunewald case was reversed in Grunewald v. United States, 353 U.S. 391. There the Supreme Court dealt with two contentions of the Government as to why the Grunewald conviction should be sustained. The second alternative contention, which does not concern us here, was held by the court to present a legal theory which the court found "unexceptional"; but the first of those contentions presented precisely the same theory upon which the present case was submitted to the jury which returned the verdict against Forman. This the Supreme Court rejected, holding that notwithstanding the subsidiary conspiracy may have arisen from an **actual** agreement to conceal, which was established by circumstantial evidence, and not a mere **implied** conspiracy to

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[4] See also the language of Mr. Justice Jackson in his concurring opinion, 336 U.S. p. 455: "I suppose no person planning a crime would accept as a collaborator one on whom he thought he could not rely for help if he were caught, but I doubt that this fact warrants an inference of conspiracy for that purpose. *Of course, if an understanding for continuous aid had been proven, it would be embraced in the conspiracy by evidence and there would be no need to imply such an agreement. Only where there is no convincing evidence of such an understanding is there need for one to be implied.*" (Emphasis supplied)

conceal **implied** from the fact that the main conspiracy was kept secret, yet the period of the statute of limitations was not extended by reason of the agreement to conceal being included as a subsidiary element or part of the original conspiracy. The court set forth this portion of the Government's theory as follows: "First, it urges that even if the main object of the conspiracy was to obtain decision from the Bureau of Internal Revenue not to institute criminal tax prosecutions—decisions obtained in 1948 and 1949—the indictment alleged, and the proofs showed, that the conspiracy also included as a subsidiary element an agreement to conceal the conspiracy to "fix" these tax cases, to the end that the conspirators would escape detection and punishment for their crime. Says the Government, 'from the very nature of the conspiracy . . . there had to be, and was, from the outset a conscious, deliberate, agreement to conceal . . . each and every aspect of the conspiracy. . . .' It is then argued that since the alleged conspiracy to conceal clearly continued long after the main criminal purpose of the conspiracy was accomplished, and since overt acts in furtherance of the agreement to conceal was performed well within the indictment period, the prosecution was timely."

That contention the court rejected. It said: "Sanctioning the Government's theory would for all practical purpose wipe out the statute of limitations in conspiracy cases, as well as extend in-

definitely the time within which hearsay declarations will bind co-conspirators." It met the Government's efforts to distinguish the Krulewitch and Lutwak cases as involving only **implied** conspiracies to conceal, whereas the Grunewald conspiracy was said to be an actual one, by saying: "True, in both Krulewitch and Lutwak there is language in the opinions stressing the fact that only an implied agreement to conceal was relied on. Yet when we look to the facts of the present cases, we see that the evidence from which the Government here asks us to deduce an 'actual' agreement to conceal reveals nothing beyond that adduced in prior cases. . . . * * * We find in all this nothing more than what was involved in Krulewitch, that is, (1) a criminal conspiracy which is carried out in secrecy; (2) a continuation of the secrecy after the accomplishment of the crime; and (3) desperate attempts to cover up after the crime begins to come to light; and so we cannot agree that this case does not fall within the ban of those prior opinions. * * * In effect, the differentiation pressed upon us by the Government is one of words rather than of substance. In Krulewitch it was urged that a continuing agreement to conceal should be implied out of the mere fact of conspiracy, and that acts of concealment should be taken as overt acts in furtherance of that implied agreement to conceal. Today the Government merely rearranges the argument. It states that the very same acts of concealment should be used as circumstantial evidence from

which it can be inferred that there was from the beginning from which it can be inferred that there was from the beginning an 'actual' agreement to conceal. As we see it, the two arguments amount to the same thing: a conspiracy to conceal is being implied from elements which will be present in virtually every conspiracy case, that is, secrecy plus overt acts of concealment. There is not a shred of direct evidence in this record to show anything like an express original agreement among the conspirators to continue to act in concert in order to cover up, for their own self-protection, traces of the crime after its commission."

Thus it seems plain that the Supreme Court was developing from considerations of policy a rule which it deemed essential to prevent a wiping out of the statute of limitations altogether in conspiracy cases. In Krulewitch the Government only undertook to argue that in every case of conspiracy, from the very nature of things a conspiracy to conceal was present and implied. In Grunewald, with no more evidence, the Government elaborated its argument by saying that the secrecy and concealment employed shows, circumstantially, that the original agreement between the conspirators actually had, as one of its intended objectives the carrying out of concealment. The policy that blocked the theory stated in Krulewitch blocks this one also. Upon the authority of this decision of the Supreme Court we hold that it was error to permit this case to go to the jury.

The judgment is reversed and the cause remanded with directions to enter judgment for the appellant.

(Endorsed:) Opinion. Filed Sept. 15, 1958.

Paul P. O'Brien, Clerk.

APPENDIX 2

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

William R. Forman, Appellant,	)	
vs.	)	No. 15,324
	)	Oct. 27, 1958
United States of America, Appellee.	)	

Upon Appellee's Petition for a Rehearing
Before HEALY, POPE and FEE, Circuit Judges.
PER CURIAM.

Upon petition for a rehearing the United States asks us to modify our decision by ordering the cause remanded to the district court for a new trial.

We think this suggestion is a proper one. In our opinion we accepted the position taken by the court below in its instructions that the conspiracy charged "was consummated upon the filing of the individual tax returns." We then proceeded, upon the authority of Grunewald v. United States, 353 U.S. 391, to hold that the case had been improperly submitted to the jury with instructions that there might be a conviction if it was a part of the conspiracy "to make continuing efforts to avoid detection and prosecution."

The Government concedes that the case was submitted to the jury on an impermissible theory but says that as in the Grunewald case, the indictment here presented an alternative theory. That

alternative theory, closely paralleling the alternative legal theory in the Grunewald case, which the Supreme Court held "unexceptionable" is based upon the allegations of paragraph "D" of the indictment quoted in our opinion which charges that the conspiracy was one "to violate . . . §145(b) of the Internal Revenue Code . . . by furnishing officers and employees of the Revenue Department false books and records and false financial statements, and by making false statements to such officers and employees, for the purpose of concealing from the Treasury Department their share of the unreported income . . . and for the purpose of concealing . . . the true income tax liability of Amador A. Seijas. . . ." So read the indictment alleges furnishing false books and reports and making false statements in an attempt to evade taxes within the meaning of §145(b) which imposes penalties upon "any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter". Such an attempt may be made by false statements to Treasury representatives. United States v. Beacon Brass Co., 344 U.S. 43.

It now appears to us that the case might have been tried upon this alternative theory, namely, that the conspiracy continued past the filing of the returns for the purpose of protecting the taxpayers from tax prosecution. What was said in the Grunewald case about this alternative aspect of the Government's case sufficiently indicates that certain of the overt acts listed in the indictment and

charged to have occurred in 1948, 1951 and 1952, involving false statements, could well have been in furtherance of and during a conspiracy having as its objective not the concealment of the conspirators' conspiracy but tax evasion. Tax evasion may include attempts not only to block prosecution of the taxpayers but to block collection of the tax. In the case of a false or fraudulent return there is no limtiation of time for collection of tax. Revenue Code 1939, §276(a), Code 1954, §6501(c)(1). The distinction between the acts of concealment which were referred to in the court's instructions upon the first trial and the acts of concealment to which we now refer, was stated by Judge Frank in his dissent when the Grunewald case was in the Court of Appeals, (United States v. Grunewald, 233 F. 2d at p. 593), with which dissent the Supreme Court agreed. As Judge Frank put it: the distinction is between "(1) acts of concealment intended (at least in part) to block prosecution of the taxpayers for tax evasion, and (2) acts of concealment intended solely to block prosecution of the conspirators for conspiracy, ..."

We now think that the record does not require a conclusion that the conspiracy here was consummated by the filing of the individual tax returns.

The last paragraph of our opinion is modified so as to provide that the judgment is reversed and the cause remanded for a new trial.

(Endorsed:) Per Curiam Opinion on Petition for Rehearing. Filed Oct. 27, 1958.

Paul P. O'Brien, Clerk.

APPENDIX 3

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

William R. Forman, Appellant,	)	
vs.	)	No. 15,324
	)	Feb. 26, 1959
United States of America, Appellee.	)	

Upon Appellant's Petition for Rehearing

Before POPE, HEALY and FEE, Circuit Judges

PER CURIAM.

On September 15, 1958 we handed down our decision herein reversing the judgment with directions to enter judgment for the appellant. On October 27, 1958, upon petition for rehearing filed by appellee, we modified our decision so as to provide that the judgment was reversed and the cause remanded for a new trial. This action was followed by a petition for further rehearing filed on behalf of the appellant in which the latter asserts that this court is without power to order a new trial.

Appellant's principal reliance is upon the case of Sapir v. United States, 348 U.S. 373, where the court summarily reversed the action of a court of appeals which modified an earlier opinion ordering an indictment dismissed so as to order a new trial.

In a concurring opinion Mr. Justice Douglas explained his view of that case as follows:

"The granting of a new trial after a judgment of acquittal for lack of evidence violates the command of the Fifth Amendment that no person shall 'be subject for the same offence to be twice put in jeopardy of life or limb.'

"The correct rule was stated in Kepner v. United States, 195 U.S. 100 at 130, 'It is, then the settled law of this court that former jeopardy includes one who has been acquitted by a verdict duly rendered. . . .' If the jury had acquitted, there plainly would be double jeopardy to give the Government another go at this citizen. If, as in the Kepner case, the trial judge had rendered a verdict of acquittal, the guarantee against double jeopardy would prevent a new trial of the old offense. I see no difference when the appellant court orders a judgment of acquittal for lack of evidence."

We think the case before us presents an entirely different situation. In the Sapir case the Court of Appeals held that the evidence "did not establish an essential element of the offense charged" and that the trial court should have entered a judgment of acquittal. Sapir v. United States, 10 Cir. 216 F.2d 722. Thus, in the words of Mr. Justice Douglas, the appellant court ordered "a judgment of acquittal for lack of evidence."

But in the case before us we did no such thing. We held that the case was submitted to the jury on an impermissible theory. The jury was simply not properly instructed. But as we noted in our

modifying opinion, the indictment was sufficent here to present an alternative theory. Furthermore the record contains evidence which would tend to sustain proof of overt acts listed in the indictment which took place as late as 1948, 1951 and 1952.

Under this permissible alternative theory, while prosecution could be supported by proof of the filing of the false returns, the conspiracy was by no means consummated then. Under this theory the conspiracy continued past the filing of the returns for the purpose of evading collection of the tax.

Since the indictment permitted prosecution on that theory, since there was evidence to support it, this was not a reversal on the basis of lack of evidence; it was for error in the instructions, a ground of error, in the words of Mr. Justice Douglas, "that infected the trial".

Appellant renews his objection to the venue. We agree with the Government's contention that since some earlier overt acts were committed in the Southern Division while the later acts took place in the Northern Division, venue requirements were satisfied, notwithstanding only the later acts satisfy the requirements of the statute of limitations.

Appellant's petition for rehearing is denied.

(Endorsed:) Per Curiam Opinion on Petition for Rehearing. Filed Feb. 26, 1959.

Paul P. O'Brien, Clerk.